Mohamad bin Abdullah v Public Prosecutor

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO A-05–167 OF 2010
LOW HOP BING, ABDUL WAHAB PATAIL AND ANANTHAM KASINATHER JJCA
17 JANUARY 2012

Criminal Law — Dangerous drugs — Trafficking — Appeal against conviction and sentence — Whether trial judge erred in findings — Whether trial judge erred in dismissing appellant's submission in the light of doubts in prosecution's case — Whether identity of 'Abang Mat' was material to offence with which appellant was charged — Whether there was likely mix-up of exhibits — Whether there was break in chain of evidence — Whether error warranted appellate intervention — Dangerous Drugs Act 1952 s 39B

Acting on information received of an active sale of the dangerous drug cannabis in an area in Perak by one 'Abang Mat', two police officers acted as agent provocateurs to lure Abang Mat to sell drugs to them. The agent provocateurs contacted Abang Mat on the telephone and set up a meeting with him. At the meeting, the agent provocateurs met with the appellant, who identified himself as Abang Mat. After the agent provocateurs and the appellant had agreed on the price and the amount of cannabis to be supplied, the appellant directed them to a house into which he entered and came out moments later with a red plastic bag that he handed over to one of the agent provocateurs. The bag was found to contain a substance that was later analysed by a government chemist to be 376g of cannabis. The appellant was charged with trafficking in the 376g of cannabis, an offence under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act'). At the close of the prosecution case the trial judge found that a prima facie case had been made out against the appellant and called upon him to enter his defence. The appellant elected to testify on oath. After hearing the defence case and the submissions, the trial judge convicted the appellant and sentenced him to death pursuant to s 39B(2) of the Act. This was the appellant's appeal against being called to enter his defence and his conviction and sentence at the end of his defence. In his petition of appeal the appellant raised 14 grounds of appeal to support his contention that the trial judge had erred in his decision and that the error warranted appellate intervention.

Held, dismissing the appeal against conviction and sentence:

(1) The appellant's submission that the trial judge had not taken into account that the agent provocateurs did not know 'Abang Mat' carried no merit as a ground of appeal. As the record shows, the appellant's identity

as the person who appeared at the arranged time and place and met with the agent provocateurs was not in any dispute. That being the case, proof of whether the appellant was in fact 'Abang Mat' or not was immaterial. According to the charge, the appellant was charged, tried and called upon to enter his defence not because he was Abang Mat but because, regardless of whether he introduced himself as 'Abang Mat' or not, he was the person who had appeared at the time and place to negotiate the sale of the cannabis and later delivered the same to the agent provocateurs. Although the trial judge dealt at some length with the arguments as to the identity of Abang Mat he made no material error to dismiss that subject. Thus, this court dismissed those grounds of appeal relating to the disputed identity of Abang Mat (see paras 19–25).

(2) The appellant's submission that the trial judge had erred in not invoking an adverse inference from the prosecution's failure to offer three other persons who had been arrested later that same day, in particular the appellant's neighbor (Zahari), was unclear. The appellant's submission that the trial judge had not considered whether Zahari was Abang Mat was a mere assertion in the appeal. Perusal of the judgment showed that the trial judge had not erred for the reason that the appellant had not raised the issue of whether Zahari was Abang Mat at any time during the trial or the submissions. In any case, the appellant could not submit that evidence had been suppressed or withheld, when no statements had been taken from the three other persons as witnesses against the appellant. Thus, this court dismissed those grounds of appeal relying on adverse inferences (see paras 29–32).

(3) It was not necessary for every person who held, carried, touched, looked at or photographed an exhibit to be called to testify and identify it. It was sufficient if the evidence produced, upon a maximum evaluation proved beyond reasonable doubt that it was the same. In the circumstances of the present case, the trial judge was entitled to not reject the exhibits just because the Chief Inspector had not identified them. The trial judge had not erred in his findings and the grounds of appeal relating to the identity of the exhibits were dismissed (see paras 33, 37– 38).

(4) In the circumstances of this case, the trial judge had not erred in not considering the lifting of fingerprints from the red bag that contained the cannabis (see paras 39–42).

(5) From the judgment it was plain that the trial judge had first considered the prosecution's submissions and then considered the submissions for the defence. It was found that the trial judge had conducted a maximum evaluation of the evidence before he concluded that a prima facie case had been made out against the appellant and called upon the appellant to enter his defence. By so doing the trial judge had duly considered the fact that the appellant had negotiated the sale of the cannabis before having

A the same delivered to the agent provocateurs. As such, there were no reasons that warranted the intervention of this court (see paras 43–46).

[Bahasa Malaysia summary

B Bertindak atas maklumat yang diterima mengenai jualan aktif dadah berbahaya kanabis di satu kawasan di negeri Perak oleh seorang yang dikenali sebagai 'Abang Mat', dua orang pegawai polis menyamar sebagai ejen provokatur untuk menarik Abang Mat menjual dadah kepada mereka. Ejen-ejen provokatur tersebut menghubungi Abang Mat melalui telefon dan
C mengatur satu perjumpaan dengannya. Di dalam perjumpaan tersebut, ejen-ejen provokatur tersebut berjumpa dengan perayu, yang memperkenalkan dirinya sebagai Abang Mat. Selepas ejen-ejen provokatur dan perayu bersetuju dengan harga dan jumlah kanabis yang perlu dibekalkan, perayu mengarahkan mereka ke sebuah rumah di mana dia masuk dan keluar
D beberapa minit kemudian dengan sebuah beg plastik merah yang diberikannya kepada salah seorang ejen provokatur. Beg tersebut mengandungi bahan yang kemudiannya dianalisa oleh ahli kimia kerajaan sebagai 346g kanabis. Perayu dituduh dengan pengedaran 376g kanabis, satu kesalahan di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952 ('Akta'). Di akhir kes pendakwaan
E hakim perbicaraan mendapati bahawa kes prima facie telah dibuat terhadap perayu dan disuruh membela diri. Perayu memilih untuk memberi keterangan bersumpah. Selepas mendengar kes pembelaan dan hujahan-hujahannya, hakim perbicaraan mensabitkan perayu dan menjatuhkan hukuman mati ke atasnya berikutan s 39B(2) Akta. Ini adalah rayuan perayu terhadap
F pemanggilan membela diri dan sabitan dan hukuman di akhir kes pembelaan. Di dalam petisyen rayuannya perayu membangkitkan 14 alasan rayuan untuk menyokong hujahannya bahawa hakim bicara telah terkhilaf di dalam keputusannya dan bahawa kekhilafan tersebut mewajarkan campur tangan perayu.

G **Diputuskan**, membenarkan rayuan terhadap sabitan dan hukuman.

(1) Hujahan perayu bahawa hakim bicara tidak mengambil kira bahawa ejen-ejen provokatur tidak mengenali 'Abang Mat' tidak membawa merit atas alasan rayuan. Seperti yang ditunjukkan di dalam rekod, identiti
H perayu sebagai orang yang muncul pada masa dan tempat yang diatur dan berjumpa dengan ejen-ejen provokatur tidak dipertikaikan. Dengan itu, bukti sama ada perayu adalah sebenarnya 'Abang Mat' atau tidak adalah tidak penting. Menurut pertuduhan, perayu dituduh, dibicarakan dan dipanggil membela diri bukan kerana dia adalah Abang Mat tetapi
I kerana, tidak kira sama ada dia memperkenalkan diri sebagai 'Abang Mat' atau tidak, dia adalah orang yang muncul pada masa dan tempat tersebut untuk berunding jualan kanabis dan kemudian menghantarnya kepada ejen-ejen provokatur tersebut. Walaupun hakim perbicaraan membicarakan panjang lebar dengan hujahan mengenai identiti Abang

Mat dia tidak melakukan kekhilafan material untuk menolak perkara tersebut. Dengan itu, mahkamah ini menolak alasan-alasan tersebut yang berkaitan dengan identiti Abang Mat yang dipertikaikan (lihat perenggan 19–25).

(2) Hujahan perayu bahawa hakim perbicaraan khilaf dalam tidak membangkitkan inferens bertentangan daripada kegagalan pihak pendakwaan menawarkan tiga orang yang lain yang ditangkap kemudian pada hari yang sama, khususnya jiran perayu (Zahari), tidak jelas. Hujahan perayu bahawa hakim bicara tidak mempertimbangkan sama ada Zahari adalah Abang Mat adalah kenyataan semata-mata di dalam rayuan tersebut. Penilaian penghakiman tersebut menunjukkan bahawa hakim perbicaraan tidak terkhilaf atas alasan bahawa perayu tidak membangkitkan isu sama ada Zahari adalah Abang Mat pada bila-bila masa semasa perbicaraan atau penghujahan. Walau apapun, perayu tidak boleh menghujah bahawa keterangan tersebut telah disekat atau ditahan, apabila tidak ada kenyataan yang diambil daripada ketiga-tiga orang sebagai saksi terhadap perayu. Dengan itu, mahkamah ini menolak alasan-alasan rayuan tersebut yang bersandar atas inferens bertentangan (lihat perenggan 29–32).

(3) Tidak perlu bagi setiap orang yang memegang, membawa, menyentuh, melihat atau mengambil gambar ekshibit mesti dipanggil memberi keterangan dan mengenalpastinya. Adalah mencukupi jika keterangan dikemukakan, selepas penilaian maksimum membuktikan tanpa keraguan munasabah bahawa ia adalah perkara yang sama. Dalam keadaan kes ini, hakim perbicaraan berhak untuk tidak menolak ekshibit semata-mata kerana Ketua Inspektor tidak mengenal pastinya. Hakim perbicaraan tidak terkhilaf di dalam penemuannya dan alasan-alasan rayuannya berkaitan dengan identiti ekshibit-ekshibit ditolak (lihat perenggan 33, 37–38).

(4) Di dalam keadaan kes ini, hakim perbicaraan juga tidak terkhilaf dalam tidak mempertimbangkan penemuan cap jari daripada beg merah yang mengandungi kanabis tersebut (lihat perenggan 39–42).

(5) Daripada penghakiman adalah jelas bahawa hakim perbicaraan telah pada mulanya mempertimbangkan hujahan pihak pendakwaan dan kemudian mempertimbangkan hujahan bagi pembelaan. Didapati bahawa hakim perbicaraan telah menjalankan penilaian maksimum keterangam sebelum memutuskan bahawa kes prima facie telah dibuktikan terhadap perayu dan memanggil perayu membela dri. Dengan berbuat demikian, hakim perbicaraan telah mempertimbangkan sewajarnya fakta bahawa perayu telah merunding jualan kanabis sebelum ia diserahkan kepada ejen-ejen provokatur tersebut. Dengan itu, tidak ada alasan yang mewajarkan campur tangan mahkamah ini (lihat perenggan 43–46).]

Notes

For cases on trafficking, see 4 *Mallal's Digest* (4th Ed, 2010 Reissue) paras 191–274.

Cases referred to

Mat v PP [1963] MLJ 263; [1963] 1 LNS 82 (refd)
Munusamy v PP [1987] 1 MLJ 492, SC (refd)
Nadarasa v PP [1972] 2 MLJ 47 (refd)
Nanda Kumar Kunyikanan & Anor v PP [2011] 8 CLJ 406, CA (refd)
PP v Mohd Radzi bin Abu Bakar [2005] MLJU 504; [2006] 1 CLJ 457, FC (refd)
PP v Saimin & Ors [1971] 2 MLJ 16 (refd)
Rajoo v Rex [1949] MLJ 250, CA (refd)
Siew Khow Seng v PP [2011] 9 CLJ 84, CA (refd)

Legislation referred to

Courts of Judicature Act 1964 s 53, 53(2)
Criminal Procedure Code s 180, 180(1), (3)
Dangerous Drugs Act 1952 s 39B(1)(a), (2), First Schedule
Evidence Act 1950 s 114(g)
Rules of the Court of Appeal 1994 r 5

Appeal from: Criminal Trial No 45–6 of 2007 (High Court, Ipoh)

Burhanudeen bin Abdul Wahid (Burhan & Co) for the appelant.
Shoba Venu Gobal (Deputy Public Prosecutor, Attorney General's Department) for the respondent.

Abdul Wahab Patail JCA (delivering judgment of the court):

[1] The appellant was charged with an offence under s 39B(1)(a) of the Dangerous Drugs Act 1952 (Revised 1980) Act 234 as follows:

> Bahawa kamu pada 15 Januari 2006, lebih kurang jam 1.30 petang, di Perhentian Teksi, Pekan Pantai Remis, Manjung, di dalam Negeri Perak, telah mengedar dadah berbahaya, iaitu Cannabis seberat 376 gram. Oleh yang demikian kamu telah melakukan suatu kesalahan di bawah seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 (Akta 234) yang boleh dihukum di bawah seksyen 39B(2) Akta yang sama.

[2] At the close of the prosecution's case, the appellant was called to enter upon his defence. The appellant elected to testify on oath. Having heard the appellant's evidence and submissions at the end of the case, the learned High

Court judge ('the learned judge') convicted the appellant and pursuant to s 39B(2) sentenced him to the penalty of death.

[3] The appellant appealed to this court against both (a) being called to enter upon his defence and (b) his conviction at the end of his defence.

APPEALS IN CRIMINAL CASES

[4] Section 53 of the Courts of Judicature Act 1964 Act 91 governs the jurisdiction of the Court of Appeal in respect of appeals from a decision of the High Court in its criminal jurisdiction. Sub-s (2) thereof provides that the petition of appeal shall contain particulars of the matters of law or of fact in regard to which the High Court is alleged to have erred the appellant shall not be permitted on the hearing of the appeal to rely on any ground of appeal other than those set forth in his petition (see *Siew Khow Seng v Public Prosecutor* [2011] 9 CLJ 84 (CA)). It means, therefore, this court must pay particular attention and confine itself to the grounds set out by the appellant under his petition of appeal.

[5] Unlike civil appeals, to which r 5 of the Rules of the Court of Appeal 1994 PU(A) 524/1994 applies, criminal appeals are not heard by way of rehearing. It means that the Court of Appeal is confined to a consideration of whether the learned judge had erred in his decision on any finding on law or facts. An error does not warrant intervention to correct it if the error did not lead the learned judge to a finding or conclusion he would otherwise not have made but for that error. This court, therefore, intervenes only if the learned judge had so erred as to warrant intervention.

[6] Correction of an error of law presents no practical difficulty to an appellate court. Correction of an error on a finding of fact is another matter. Where the finding of fact made is in the nature of an inference or conclusion of fact from other facts, an error in the logic or reasoning leading to the erroneous inference or conclusion may be corrected. But where a finding of fact results from the special advantage that a trial judge has of hearing and seeing a witness testify and being tested before him, that finding, which is the exercise of his judgment by a judge of original jurisdiction, can only be held to be an error that justifies an intervention to correct it only if it is in manifest and material contradiction of the evidence before the trial judge and had led him to a finding or conclusion he would otherwise not have made. To go beyond, effectively to rehear and substitute the decision of the High Court with one of its own is acting beyond its own jurisdiction and an interference with the jurisdiction of the court appealed from.

[7] To avoid an inadvertent error of proceeding as a rehearing, the grounds of

appeal, to be of best assistance to the appellant, must be written and therefore read, not as points of argument in submissions before a trial court, but must, as required under s 53(2) of the Courts of Judicature Act set out particulars of law and of fact, of where in the judgment and how in the light of the evidence before him, the trial judge had erred. Grounds stated in clear and precise terms are much more persuasive than those expressed in general and vague terms, implying tentativeness and uncertainty. Appeal submissions that follow through with precise and clear references to law, evidence and fact, transmit confidence and invite adoption.

[8] Section 180 of the Criminal Procedure Code (Revised 1999) Act 593 provides that a criminal trial is heard in two stages: the prosecution case and the defence case. The latter is at the election of the accused if the trial court finds that the prosecution had proved a prima facie case.

[9] The approach with regard to whether a prima facie case had been made out at the end of the prosecution case was summarised in *Public Prosecutor v Mohd Radzi bin Abu Bakar* [2005] MLJU 504; [2006] 1 CLJ 457 (FC):

> [12] After the amendments to s 173(f) and s 180 of the CPC, the statutory tests have been altered. What is required of a subordinate court and the High Court under the amended sections is to call for the defence when it is satisfied that a prima facie case has been made out at the close of the prosecution case. This requires the court to undertake a maximum evaluation of the prosecution evidence when deciding whether to call on the accused to enter upon his or her defence. It involves an assessment of the credibility of the witnesses called by the prosecution and the drawing of inferences admitted by the prosecution evidence. Thus, if the prosecution evidence admits of two or more inferences, one of which is in the accused's favour, then it is the duty of the court to draw the inference that is favourable to the accused. See *Tai Chai Keh v Public Prosecutor* [1948] 1 LNS 122; [1948-49] MLJ Supp 105; *Public Prosecutor v Kasmin bin Soeb* [1974] 1 LNS 116; [1974] 1 MLJ 230. If the court, upon a maximum evaluation of the evidence placed before it at the close of the prosecution case, comes to the conclusion that a prima facie case has not been made out, it should acquit the accused. If, on the other hand, the court after conducting a maximum evaluation of the evidence comes to the conclusion that a prima facie case has been made out, it must call for the defence. If the accused then elects to remain silent, the court must proceed to convict him. It is not open to the court to then re-assess the evidence and to determine whether the prosecution had established its case beyond a reasonable doubt. The absence of any evidence from the accused that casts a reasonable doubt on the prosecution's case renders the prima facie case one that is established beyond a reasonable doubt. Put shortly, what the trial court is obliged to do under s 173(f) and s 180 of the CPC is to ask itself the question: If the accused elects to remain silent, as he is perfectly entitled to do, am I prepared to convict him on the evidence now before me? See *Dato' Mokhtar bin Hashim & Anor v Public Prosecutor* [1983] 2 CLJ 10; [1983] CLJ 101 (Rep); [1983] 2 MLJ 232. If the answer to that question is in the

affirmative, then the defence must be called. And if the accused remains silent, he must be convicted. If the answer is in the negative, then the accused must be acquitted.

[10] For completeness, we would add the maximum evaluation involves not only evaluation of the credibility of the witnesses called by the prosecution but also whether the evidence adduced in the case leaves no gaps in the narrative of the prosecution case as charged. We hasten to add that, for the removal of doubt, it does not mean calling witnesses to narrate the whole ad nauseum story and waste time, effort and cost in an unnecessarily long trial. The term 'narrative of the prosecution case as charged' is a term of art that means 'to narrate the date, time and place, and the act complained of constituting the offence as charged'. If the charge is that the offence is committed in one place but the evidence shows it was committed in another, he cannot be convicted unless the charge is amended. But even if it seems clear he had committed the act constituting the offence, he cannot be convicted if it cannot be proved where he committed it.

[11] The classic statement of the approach at the end of the defence case was set out in *Mat v Public Prosecutor* [1963] MLJ 263 (HC); [1963] 1 LNS 82:

> The correct law for magistrates to apply is as follows. If you accept the explanation given by or on behalf of the accused, you must of course acquit. But this does not entitle you to convict if you do not believe that explanation, for he is still entitled to an acquittal if it raises in your mind a reasonable doubt as to his guilt, as the onus of proving his guilt lies throughout on the prosecution. If upon the whole evidence you are left in a real state of doubt, the prosecution has failed to satisfy the onus of proof which lies upon it.
>
> The position may be conveniently stated as follows:
>
> (a) If you are satisfied beyond reasonable doubt as to the accused's guilt … Convict.
>
> (b) If you accept or believe the accused's explanation … Acquit.
>
> (c) If you do not accept or believe the accused's explanation … Do not convict but consider the next steps below.
>
> (d) If you do not accept or believe the accused's explanation and that explanation does not raise in your mind a reasonable doubt as to his guilt … Convict
>
> (e) If you do not accept or believe the accused's explanation but nevertheless it raises in your mind a reasonable doubt as to his guilt … Acquit

[12] Therefore, in this instant appeal, we examined the grounds set out in the petition of appeal as well as the record of appeal not as a rehearing but to examine whether the High Court had:

(a) made any error in the interpretation and application of substantive or procedural law;

(b) at the close of the prosecution case, applied a maximum evaluation of the evidence adduced before it as to whether the prosecution had proved a prima facie case and the threshold applied in the maximum evaluation satisfied the question 'If the accused elects to remain silent, as he is perfectly entitled to do, am I prepared to convict him on the evidence now before me? And if the answer to that question is in the affirmative, the defence must be called. And if the accused elects to remain silent, he must be convicted. If the answer is in the negative, then the accused must be acquitted'; and

(c) at the end of the defence case, if called upon, and regardless whether the High Court believes the defence evidence or not, considered whether the defence had raised a reasonable doubt.

BRIEF BACKGROUND

[13] The prosecution case is that the appellant trafficked in 376g of the cannabis proscribed under the First Schedule of Act 234. In support of its case, the prosecution relied upon two main witnesses, RF/124888 Mohd Shafiee bin Jusoh ('SP7') and Sub-Inspector Busra bin Abd Kadir ('SP8'), who acted as agent provocateurs. The testimony of SP7 may be summarised as follows:

(a) an informer gave him information that one 'Abang Mat' was actively selling the dangerous drug cannabis in the area of Pantai Remis, Perak and that the said 'Abang Mat' had requested him to look for potential buyers;

(b) he called 'Abang Mat' at the telephone number given to him by the informer, and was told that supply was available and to meet him at a taxi stand located in front of some shop-houses next to Billion Supermarket in Pantai Remis;

(c) SP7 informed this 'Abang Mat' that he would arrive with another person in a Proton Knight car with licence plate No CAD 4503;

(d) arriving with SP8 at the place and time agreed, a Malay man called out to them. The Malay man was the appellant. He identified himself as Abang Mat;

(e) they proceeded to negotiate the supply and price of the cannabis. On

reaching agreement, SP7 drove with the appellant directing him to a house which the appellant entered and came out moments later with a red plastic bag which he handed over to SP7; and

(f) the red plastic bag contained a package found to contain 376g of cannabis.

[14] The testimony of SP8 broadly supported that of SP7.

[15] Having considered, in accordance with s 180(1) of the Criminal Procedure Code (Revised 1999) Act 593, whether the prosecution had made out a prima facie case against the accused, and finding that the prosecution had done so, the learned judge acted under sub-s (3) thereof to call upon the accused to enter on his defence. He did so. At the end of the defence case, and after hearing submissions, he was convicted. He gave notice of appeal against conviction and sentence. His petition of appeal is addressed below.

THE PETITION OF APPEAL

[16] In his petition of appeal, the appellant set out 14 grounds where it is said the learned judge had erred. So that the grounds may be addressed more clearly and conveniently, we have rearranged the order of the grounds in discrete categories of grounds so that they appear much less as ad hoc separate grounds. We have also separated the grounds in two parts, corresponding to the two stages of a criminal trial under s 180 of the Criminal Procedure Code, ie those pertaining to the prima facie case and those to the defence case:

(a) The prima facie case

(i) Ground 1 — *Apabila memutuskan bahawa pihak responden telah berjaya untuk membuktikan satu kes prima facie terhadap perayu.*

Identity of Abang Mat

(ii) Ground 2 — *Apabila menilai fakta bahawa SP7 tidak pada bila-bila masa berjumpa dengan Abang Mat semasa melakukan urusan jual beli dan dengan demikian tidak mengenali Abang Mat.*

(ii) Ground 3 — *Apabila tidak memutuskan bahawa hanya pemilik telefon bimbit dimana mengandungi nombor talian yang dihubungi oleh SP7 sahaja boleh di kenal pasti sebagai Abang Mat.*

(iv) Ground 4 — *Apabila memutuskan bahawa terdapat gap antara masa panggilan telefon dibuat oleh SP7 kepada Abang Mat dan semasa perayu ditangkap untuk kemukakan telefon bimbit tersebut dan telah meletakkan inferen bertentangan daripada keterangan yang sedia-ada.*

(v) Ground 6 — *Apabila gagal menilai keterangan bahawa terdapat lagi*

tangkapan di rumah dan juga tempat lain dan kemungkinan salah satu tangkapan lain adalah Abang Mat dan bukannya perayu.

(vi) Ground 14 — *Apabila gagal menilai bahawa perayu bukanlah pengedar memandangkan tiga orang lagi ditangkap dan identiti Abang Mat dipertikaikan.*

Adverse inference

(vii) Ground 5 — *Apabila membuat hanya satu inferen sahaja memandangkan nama Abang Mat tidak disebut kepada Chief Inspector Rames a/l Nagayah ('SP9') malah banyak inferen-inferen memihak perayu boleh dibuat.*

(viii) Ground 7 — *Apabila gagal menilai bahawa kegagalan SP7 memberikan nombor telefon bimbit dan nama Abang Mat kepada SP9 adalah menunjukkan bahawa tiada negotiation antara SP7 dan Abang Mat.*

(ix) Ground 8 — *Apabila gagal menilai kes Munusamy v Public Prosecutor di dalam kes ini kerana adalah jelas SP7 telah 'withholding or suppression of evidence' apabila tidak memberikan butir-butir Abang Mat dan talipon nombor nya kepada SP9.*

(x) Ground 13 — *Apabila gagal menggunakan* s 114(g) *Akta keterangan 1950 kerana kegagalan responden mengemukakan tangkapan lain di rumah tersebut atau menawarkan kepada perayu, khasnya tangkapan yang bernama Zaidi yang dikatakan adalah Abang Mat oleh pembelaan.*

Identity of the exhibits

(xi) Ground 9 — *Apabila tidak menilai keterangan I/9793 Mohamad bin Johari ('SP5') berkenaan dengan masa tandaan barang-barang kes dibuat adalah selepas dua lagi tangkapan dibuat telah meragukan identiti barang kes.*

(xii) Ground 11 — *Apabila gagal memutuskan bahawa SP9 sebagai pegawai penyiasat tidak pada bila-bila masa mengecam barang-barang rampasan di dalam mahkamah mulia semasa perbicaraan.*

Failure to lift fingerprints

(xiii) Ground 10 — *Apabila gagal menilai bahawa penimbulan cap jari adalah penting kerana dadah tersebut dibawa dari rumah tersebut dan tiga orang kemudian telah ditangkap dari rumah tersebut.*

(b) The defence case

(xiv) Ground 12 — *Apabila tidak menilai keterangan perayu yang adalah amat munasabah dan boleh dipercayai.*

THE PRIMA FACIE CASE

[17] In this part we proceed to address the other grounds of appeal before returning to the first ground.

IDENTITY OF ABANG MAT

[18] For the purpose of clarity we refer to what Abang Mat heard in telephone conversations as 'Abang Mat' ie with quotation marks, and the appellant who SP7 and SP8 met at the coffee shop and allegedly introduced himself as Abang Mat as 'Abang Mat' ie with inverted commas.

[19] Notwithstanding the shortcoming in the phraseology of ground 2, and giving it a liberal interpretation we take it that what is meant in ground 2 as the error is that the learned judge did not take into account that SP7 did not know 'Abang Mat'. That appears like a good basis for an argument, but it carries no merit as a ground of appeal. Indeed other questions arise if an investigator knows personally the person he is investigating. The appellant's submission is, at best, a submission in respect of ability to identify a person, if identity of that person is relevant. As the record shows, the appellant's identity as the person who appeared on the aforesaid time and place and met with SP7 is not in any dispute. That being the case, whether he is in fact 'Abang Mat' or not is immaterial. It follows that proof of who is in fact 'Abang Mat' is equally immaterial to the offence with which the appellant is charged, tried and called to enter upon his defence. Whether SP7 was right to conclude that the Abang Mat that he heard on the telephone and the appellant is the same person, and whether or not the appellant introduced himself as Abang Mat is beside the point. The submissions on production or non-production of the mobile telephone relate to the question of identity of that 'Abang Mat' is accordingly of no relevance.

[20] Likewise ground 4 and ground 6 become immaterial.

[21] The direct observation that may be made on ground 14 is that the identity of Abang Mat has little, if at all, to do with whether the appellant is a drug trafficker. In respect of the charge, the appellant was charged, tried and called to enter upon his defence not because he was 'Abang Mat' but because, regardless whether he introduced himself as Mohamad or 'Abang Mat' he was the person who had appeared at the time and place as charged, and if the allegation is proved that he had negotiated the sale of and delivered to SP7 the cannabis and which was later confirmed by the chemist Tiang Tock Ching ('SP3') to be 376g of the dangerous drug cannabis proscribed under the First Schedule to Act 234, the offence would have been committed by the appellant.

[22] Ground 14, insofar as it pertains to the disputed identity of Abang Mat must, for the reasons given above, be dismissed. It must also fail for the reason that the question whether the appellant is a drug trafficker is quite independent of the question whether the three other persons subsequently arrested were drug traffickers or not.

[23] The learned judge was quoted in the submissions for the appellant as having said the following in his judgment:

> … Both the undercovers (sic) SP7 and SP8 left at 11.40 am. On the way to Pantai Remis Taxi Stand SP7 phoned Abang Mat at this handphone No 017–5546162 informing Abang Mat that he had just left Manjung. At about 12.40 noon, SP7 and SP8 reached the taxi stand in front (sic) of the row of shop houses besides the Billion Supermarket and parked his car there.
>
> …
>
> … From the evidence adduced, one must not forget that there are gaps from the time the accused was contacted by phone by SP7 while SP7 was on the way to meet the accused at Pantai Remis taxi stand to the time of his arrest. During those gaps anything could have happened to his phone for the reasons best known to the accused …

[24] We find that although the learned judge was ensnared into and dealt at some length with the arguments as to the identity of Abang Mat, he made no material error to dismiss that subject. Upon the evidence and submissions at the end of the prosecution case, it was obvious the argument was a non-starter. The learned judge ought to have dismissed that subject without hesitation in one brief paragraph.

[25] We dismiss the grounds of appeal relating to the issue of identity of Abang Mat.

ADVERSE INFERENCE

[26] Although ground 5 states there are many inferences, what the desired inference was left to imagination. Insofar as the submission for adverse inference pertains to the identity of Abang Mat, it is of no relevance for the reasons above.

[27] The argument advanced in ground 7 is that not mentioning of the existence of 'Abang Mat' and his mobile telephone number to SP9 means there had been no negotiations between SP7 and 'Abang Mat'. We do not see what point the argument '… there had been no negotiations between SP7 and 'Abang Mat' serves and how it helps the case for the appellant except to raise a

question as to the credibility of SP7. The prosecution case, however, is not wholly dependent on the testimony of SP7 alone.

[28] Ground 8 is that the learned judge erred when he failed to consider *Munusamy v Public Prosecutor* [1987] 1 MLJ 492 (SC) when it is clear there was 'a withholding or suppression of evidence' when SP7 did not tell SP9 about the particulars of 'Abang Mat' and his mobile telephone number. It is plain *Munusamy v Public Prosecutor* and the context of the legal objection of withholding or suppression of evidence was either not read or not understood. In *Nanda Kumar Kunyikanan & Anor v Public Prosecutor* [2011] 8 CLJ 406, the Court of Appeal had stated, yet again in clear and unequivocal terms, that the use of the word 'may' means that an adverse inference is discretionary and not mandatory. Further there must be a withholding of evidence. The learned judge did not err in holding that not informing SP9 is not suppression or withholding of evidence within the meaning of *Munusamy v Public Prosecutor* and s 114 Illustration(g) of the Evidence Act 1950 (Act 56) from which it stems.

[29] In ground 13 s 114 Illustration (g) was invoked for an adverse inference upon the ground that the prosecution had failed to offer to the defence the three persons who were arrested later the same day, in particular one named Zaidi.

[30] Perusal of the judgment showed that the learned judge had not considered this Zaidi. Instead the learned judge had addressed his mind to whether one 'Zahari bin Mohamad' was 'Abang Mat'. On perusal of the notes of proceedings, we conclude the learned judge did not err for the reason that the question of one 'Zaidi' being 'Abang Mat' had not been raised at any time at trial or submissions. At all times the person alleged to be 'Abang Mat' was one Zahari bin Mohamad who was the appellant's neighbour to the front of his house. To read ground 13 as an appeal on failure to find Zahari bin Mohamad was Abang Mat would be to ignore the specific language of s 53(2) of the Courts of Judicature Act 1964 (Act 91). Even if it were proper for this court to consider it as such, one would think a 'Zahari bin Mohamad' is much less likely to be called 'Abang Mat' than a 'Mohammad bin Abdullah'. How 'Zahari bin Mohamad' became known as 'Abang Mat' was not laid out in cross-examination, or even in the defence case. It was merely asserted.

[31] With regard to not offering the three other persons to the appellant, we observe that although they have been arrested in respect of drug in similar description, there is no assertion that statements had been taken from them as witnesses against the appellant and such statements were suppressed or withheld from the appellant for his defence. Therefore it cannot be said that any evidence is being suppressed or withheld from the appellant. Indeed

nothing is said of how their testimony would aid the defence. Therefore what is the adverse inference to be drawn is also unclear.

[32] Accordingly, we hold that the learned judge did not err when he did not draw any adverse inferences. We dismiss the grounds of appeal relying on adverse inference.

IDENTITY OF THE EXHIBITS

[33] Ground 9 raised the likelihood of a mix-up of exhibits in the light of the fact three other arrests were made the same day.

[34] The issue of possible mix-up had been submitted upon before the learned judge, who had addressed it in detail in his judgment. He had set out his reasons. Examination of the reasons and comparison of the reasons against the notes of proceedings do not show any reason to suggest that the finding by the learned judge that there was no mix-up of exhibits contradicted any of the evidence before him. To express it in another way, the learned judge had not made any finding that he was not entitled to on the evidence before him. Bearing in mind the advantage the learned judge had of seeing and hearing SP5, SP7, SP8 and SP9 testify and tested before him, it would require a demonstration that the finding is a manifest and material contradiction of the evidence before the learned judge before an appellate court will allow itself to be prevailed upon to intervene. Mere disagreement with his finding falls well short of demonstrating a manifest and material contradiction. Anything short of that is an interference. That cannot be warranted.

[35] More ominous sounding is ground 11 which asserts that the learned judge erred when he failed to hold that SP9 as investigating officer had not at any time in court during the trial identified the exhibits.

[36] Earlier at the trial, it had been submitted that neither SP7 nor SP8 had identified the exhibits. That has not been brought up at the instant appeal.

[37] Exhibits are identified to ensure that the chemist report is made upon the same substance that was taken, directly or indirectly, from the person accused, in this case, of trafficking in it. The two must be the same. The term 'chain of evidence' is a useful figure of speech, a metaphor, to describe that obvious requirement. To take the figure of speech further, the chain may be wound in coils, folded upon itself or even twisted, but if there is no reasonable doubt that it is the same, then the coiling folding and twisting are immaterial. Hence, it is not necessary that every person who held, carried, touched, looked at or photographed it must be called to testify and to identify it. It is sufficient if the evidence produced, upon a maximum evaluation, proves beyond

reasonable doubt it is the same. In an adversarial system, it is for the prosecution to decide upon evidence they will adduce in seeking to discharge the heavy burden of proof that remains at all times upon them (see *Rajoo v Rex* [1949] MLJ 250 (CA); *Nadarasa v Public Prosecutor* [1972] 2 MLJ 47; *Public Prosecutor v Saimin & Ors* [1971] 2 MLJ 16). In this case, SP9 did testify and was cross-examined. It was not put to him, for example, that he had switched the exhibits and made identical markings, so that the necessity for examination of the plastic bag and the packaging becomes necessary to determine if his explanation is credible or not. That not being the case, the necessity for the witness to be called upon to identify the exhibits and opportunity given to be cross-examined thereon did not arise. Other that speculation it could have led to another finding, there is no reason given to enable the court to determine judicially if a reasonable doubt was caused thereby. It was, therefore, at best an unnecessary oversight. It cannot, in this circumstance, be said that the learned judge had not erred in not rejecting the exhibits on the ground that SP9 did not identify the exhibits. On the basis of the evidence before him, the learned judge was entitled to make the findings as he did.

[38] We, therefore, dismiss these grounds of appeal relating to the identity of the exhibits.

FAILURE TO CONSIDER LIFTING OF FINGERPRINTS AS IMPORTANT

[39] We examined ground 10. It says that the learned judge erred when he failed to consider that the lifting of fingerprints was important because the said drug was brought from the said house and later three persons were arrested from the said house.

[40] The evidence shows that an attempt at lifting fingerprints was carried out by Lans-Koperal RF/99437 Razali bin Hj Abdullah ('SP1') and SP9, but no useful fingerprints emerged. We bear in mind that the appellant took the package in the red plastic bag from the house and handed it to SP7. SP7 had opened it to verify its contents. It is not the normal exhibit found at the scene of a crime. It would have been a dead giveaway if SP7 had refused to touch the red plastic bag and package and insisted upon it being handled as a police exhibit. He had to maintain the fiction he was a bona fide buyer. Handing back the package to the appellant would, in any case, negated the value of any of the appellant's fingerprints even if any is found on the red plastic bag and the package. The presence of fingerprints of any other person would be evidence that some other person had handled it, but the germane question is that regardless of where and from whom he got the package from, was the appellant the person who, as alleged, negiotiated the sale and then delivered the drug to SP7.

[41] At para 7.4.1(8) the learned judge had said:

> The fingerprint, if any, on the exhibits had been destroyed by SP5 himself when he removed the red plastic parcel from the dashboard without wearing gloves. If he knew that the fingerprint would be removed when he took the parcel from the dashboard without wearing any gloves, learned counsel for the defence ask 'why SP5 did not stop SP1 and SP9 from doing the fingerprint dusting?'.
>
> With respect I do not follow learned defence counsel submission on this issue. I find that there was nothing wrong for SP5 to instruct SP1 and SP9 to conduct a fingerprint dusting on the exhibits recovered irrespective of whether or not SP5 was wearing gloves when he recovered and examined the parcel.
>
> However, I am of the view that fingerprint dusting in this case is not necessary as the identity of the person who placed the parcel in the compartment of the dashboard had been established by the prosecution.
>
> On the whole, I find that the attacks on the credibilities of SP5, SP7 and SP8 based on the above grounds are without merits.

[42] The point raised in ground 10 was not raised in submissions for the appellant before the judge. What practical purpose would be achieved to identify fingerprints of other persons was not asserted. The learned judge's remarks were in relation to the respective credibility of SP5, SP7 and SP8, and submission on the failure of SP5 to stop SP1 and SP9 from attempting to lift fingerprints. Made in the context that it was made, we cannot say that the learned judge had so erred as to warrant intervention by this court.

ALLEGATION THAT APPELLANT TRAFFICKED AND TESTIMONY OF PROSECUTION WITNESSES

[43] We have said at paras 21 and 27 above we will address the issues further. It relates to the allegation that the appellant met with SP7, negotiated the sale of cannabis and delivered it to SP7.

[44] From the judgment, it is plain the learned judge first considered the prosecution's submissions. Then he proceeded to consider the submissions for the defence. He paid particular attention to defence version laid out in cross-examination and submissions before giving his reasons why he rejected them. Then only did the learned judge proceed to sum up his finding that the prosecution had made out a prima facie case and called upon the appellant to enter upon his defence.

[45] We find that in so doing the learned judge had duly considered the version that the appellant negotiated the sale of and delivered the cannabis. For the reasons we have outlined earlier above, we find no error that warrants intervention in his dismissal and his reasons for dismissal of the appellant's

submissions in respect of doubts in the prosecution version, likely mix-up of exhibits, break in the chain of evidence and that the investigation was incomplete.

[46] The sentence for the offence the appellant is convicted upon is mandatory.

[47] Accordingly, we dismissed the appeal against both conviction and sentence and affirm the conviction and sentence passed by the High Court.

Appeal against conviction and sentence dismissed.

Reported by Kohila Nesan